91-983
No.

In The

Supreme Court of the United States

October Term, 1991

ALLSTATE INSURANCE COMPANY,
an Illinois Corporation,

Petitioner,

v.

SAMUEL F. FORTUNATO,
Commissioner of Insurance of
The State of New Jersey,

Respondent.

Petition For A Writ Of Certiorari To The Appellate Division Of The Superior Court Of The State Of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Due Process Clause of the Fourteenth Amendment permit a State to compel a company to take on new business against its will and at State-mandated rates, without first permitting judicial review of constitutional adequacy of those rates?

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF THE STATE OF NEW JERSEY

Petitioner, Allstate Insurance Company ("Allstate"),[1] prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Division of the Superior Court of the State of New Jersey ("Appellate Division") entered in this action on May 20, 1991.[2]

OPINIONS BELOW

The Commissioner entered the challenged order (Appendix 1) without opinion. The Opinion of the Appellate Division (Appendix 2) is reported at 248 N.J. Super. 367, 591 A.2d 631 (1991). The New Jersey Supreme Court denied certification without opinion (Appendix 3).

JURISDICTION

The final judgment of the Appellate Division was entered on May 20, 1991. Allstate filed a timely petition for certification by the New Jersey Supreme Court on July 9, 1991 (App. 4). On July 12, 1991, Allstate also filed a timely notice of appeal as of right on the constitutional issues presented (App. 5). The New Jersey Supreme Court's denial of certification (which also dismissed the

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[1] Allstate is a wholly-owned subsidiary of Sears Roebuck & Co. Allstate's non-wholly-owned subsidiaries are Allstate Automobile & Fire Insurance Company, Limited; Saison Life Insurance Company, Ltd.; Samshin Allstate Life Insurance Company, Ltd.; and Tramed (a Russian company).

[2] The respondents to this petition are Samuel F. Fortunato, Commissioner of Insurance of the State of New Jersey ("Commissioner"); Aetna Casualty & Surety Co. ("Aetna"); and Colonial Penn Insurance Company ("Colonial Penn"). Aetna and Colonial Penn were the subjects of orders similar to the one issued to Allstate, and the three appeals from those orders were consolidated.

appeal) was entered on September 18, 1991. Jurisdiction is conferred on this Court by 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case presents questions under the Fifth and Fourteenth Amendments to the United States Constitution (App. 6). It implicates the following New Jersey statutes: The Fair Automobile Insurance Reform Act of 1990 ("FAIRA"); *N.J. Stat. Ann.* 17:29A-14 to -44, 17:29C-7.1, 17:30E-1 to -14, 39:6A-3; and N.J. Admin. Code 11:2-29.1 *et seq.*, 11:3-8.3 to -8.4. All are reproduced in Appendices 7 and 15.

STATEMENT OF THE CASE

Nature of the Case

The confiscatory order at issue in this case is the product of a long and sorry history of New Jersey regulation. That January 24, 1991 order ("Depopulation Order" or "Order") of the Commissioner requires Allstate to offer insurance for over 32,000 vehicles ("exposures") previously insured by state-run entities. *Under this Order, Allstate will be required to issue policies at rates which would produce an annual operating loss of over $600 per assigned policy and over $20,000,000 total.* (Aa 43A-44A, ¶ 3)[3]

Allstate could not recoup any of the losses on this assigned business in the New Jersey voluntary automobile insurance market, because suppressive rate regulation promises to produce an operating loss of over $90 million on all of Allstate's New Jersey voluntary auto policies written in 1991. (Aa 44A, ¶ 5) Indeed, that same rate regulation had already caused Allstate $32 million in

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[3] Allstate's Appendix in the Appellate Division will be cited as "Aa." Allstate's Appendix to its stay motion to the Commissioner, which was accepted as a supplement to the record by the Appellate Division, will be cited as "Asa."

auto insurance operating losses over the prior 15 years. (Aa 44A, ¶ 4) Nor could Allstate's other lines of New Jersey insurance business (and those of its affiliates) generate sufficient profits to cover the heavy flow of red ink in the auto lines. (Aa 44A, ¶ 6)

Allstate cannot increase the rates for either its own business or the assigned business without the Commissioner's prior approval. That approval cannot be obtained without lengthy rate proceedings,[4] during which Allstate would suffer enormous losses on the assigned business. Yet, New Jersey law does not permit losses resulting from inadequate rates to be recovered through future rate increases. *In Re Elizabethtown Water Co.*, 107 N.J. 440, 449-51, 527 A.2d 354, 359-60 (1987); *In Re Industrial Sand Rates*, 66 N.J. 12, 23, 327 A.2d 427, 433 (1974). And Allstate could not even cease doing business in New Jersey without the Commissioner's permission, which it is now seeking to obtain.[5]

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[4] While Allstate had applications for voluntary-market rate increases pending long before this case was filed (Asa Tabs 12, 13), New Jersey has yet to provide even an initial decision on those applications. Allstate has been permitted certain small increases in its voluntary-market rates to account for rising price levels. As explained at 29-30 n. 26, *infra*, none of those rate increases can possibly provide any excess profits in the voluntary market to subsidize depopulation losses. Thus, no action on voluntary-market rates has mooted Allstate's claim here. Allstate's projections for its 1991 New Jersey business have not changed materially since this case was filed.

[5] The New Jersey no-fault automobile insurance statute *N.J. Stat. Ann.* 39:6A-1 *et seq.* ("No-Fault Act") requires an insurer to renew automobile insurance policies unless the Commissioner consents to non-renewal. *Id.* 39:6A-3; 17:29C-7.1. The Commissioner consents only in very limited circumstances. N.J. Admin. Code 11:3-8.3 to 8.4. This consent is required even when an insurer seeks to withdraw from the state. *Sheeran v. Nationwide Ins. Co.*, 80 N.J. 548, 556-57, 404 A.2d 625, 631 (1979).

(Continued on following page)

These events are the culmination of twenty years of abusive rate regulation by the State of New Jersey in the face of skyrocketing costs of compensating automobile accident victims. Unwilling either to curtail benefits or to make motorists pay for them in full, the State has continually kept insurance rates below cost, in large part by exploiting the potential for interim confiscation inherent in a strict system of purely prospective prior-approval ratemaking. The effect has been to bleed insurers of income and assets generated in other States for the benefit of New Jersey motorists, first holding out the illusory hope of a brighter tomorrow, then obstructing exit by automobile insurers.

In 1983, when suppression of rates led insurers to curtail their voluntary New Jersey auto insurance business, the State created the New Jersey Automobile Full Insurance Underwriting Association (the "JUA") to insure, at standard-risk rates, those very motorists to whom insurers were unwilling to sell insurance voluntarily at those rates. There were supposed to be subsidies built into the system to cover the rate deficits sure

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The Fair Automobile Insurance Reform Act of 1990 ("FAIRA") also prohibits withdrawal except pursuant to a detailed plan approved in advance by the Commissioner. FAIRA, § 72. The Commissioner ordinarily requires the insurer to continue writing automobile insurance for five years after he approves such a plan, during which an insurer must expand its New Jersey automobile insurance business as required by depopulation obligations and soon-to-be-effective obligations to write insurance on request for all "eligible" drivers. N.J. Admin. Code 11:2-29.1 *et seq*. (App. 15); FAIRA § 27(b).

Allstate filed a proposed plan of withdrawal on September 16, 1991. The Commissioner has requested additional information before he will act on that plan. On this basis, it appears that *Allstate is unlikely to be able to cease doing business in New Jersey before 1997*, and there is no assurance that it will be able to do so even then.

to result from selling JUA policies at standard rates. But the Commissioner, unwilling to force motorists to pay the full subsidy required, adopted "cash-flow" ratemaking techniques which postponed funding of losses into the future. When the inevitable crash came in 1990, the JUA was replaced by a new entity, the Market Transition Facility ("MTF"), and the lion's share of the $3.3 billion JUA deficit was imposed on the insurance industry.

New Jersey now seeks to compel insurers to cover JUA/MTF risks at MTF rates, whose demonstrated gross inadequacy is the legacy of the deliberately inadequate JUA rates, while subjecting insurers to protracted rate proceedings during which their right to be free from confiscation receives no protection at all.

Allstate has shown prima facie that the Depopulation Order will have a confiscatory effect. Yet, both the Commissioner and the New Jersey courts have refused to provide procedures adequate to prevent such confiscation during the pendency of the protracted rate proceedings. Accordingly, Allstate submits that, on the record presented here, the Commissioner cannot require it to obey the Depopulation Order without first either providing the rate relief shown prima facie to be necessary or allowing Allstate to obtain judicial review of a decision that such relief is unnecessary.[6]

New Jersey's High Cost and Underfunded Automobile Insurance System

In 1972, New Jersey adopted a No-Fault Act designed to provide prompt benefits to all accident victims while

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[6] It should be emphasized that the rate relief which Allstate seeks (absent a finding of no confiscation) could be temporary, "interim" relief, escrowed until the final rate determination and refunded (with interest) if later found excessive. Thus, Allstate would be able to collect the rates eventualy found necessary, while policyholders ultimately need never pay any excessive amount.

reducing or stabilizing automobile insurance prices. *Thermographic Diagnostics, Inc. v. Allstate Ins. Co.*, 125 N.J. 491, 508, 593 A.2d 768, 778 (1991). However, the No-Fault Act failed to balance benefit increases with sufficient cost reductions. It thus substantially increased losses payable by insurers.[7]

While New Jersey officials were unwilling to reduce the costs of the no-fault system enough to bring it into balance, they were equally unwilling to impose the entire cost of that system on the voting public. As Deputy Commissioner Grubb succinctly put it (Aa 56A):

> Since 1973, New Jersey has used tight controls on auto rates to avoid paying the actual cost of the state's high accident rate and unbalanced no-fault system. As a result, the voluntary market has been unprofitable, and the residual market (ie., the JUA) has grown to almost half of the state's motorists.

This fact was confirmed by an *Insurance Profitability Report*, published by the New Jersey Department of Insurance in November, 1989, which found that "although private passenger auto has been a profitable insurance line nationally, the industry generated a 2.8 percent operating loss, or $521 million, in New Jersey over a 13-year period ending in 1988." (Aa 47A)

As already shown, if an insurer's rates are inadequate, New Jersey law does not permit the resulting losses to be recovered through future rate increases. Yet all increases require the prior approval of the Commissioner, who has extensive power to delay or deny such increases even if well justified.

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[7] This fact was acknowledged by state officials, including then Governor Kean, *Governor's Reconsideration and Recommendation Statement to Senate No. 2637-L. 1988 c. 119*, reprinted at *N.J. Stat. Ann.* 17:28-1.4, and Special Deputy Insurance Commissioner David N. Grubb, in a 1988 report entitled *Solving the Auto Insurance Crisis in New Jersey* (the "Grubb Report"). (Aa 54A-56A)

To alter its rates, an insurer must file proposed amendments with the Commissioner and obtain his approval. *N.J. Stat. Ann.* 17:29A-14. The Commissioner can certify the filing for a hearing and is required to do so on request. *Id.* Until the Commissioner decides, the insurer has not exhausted its administrative remedies, and, so, is unable to obtain substantive judicial review. After a decision, judicial review of a denial or partial denial of the insurer's application normally consumes many months, if not years.[8]

In most lines of insurance, an insurer unable to obtain adequate rates could curtail its writings in the affected market or withdraw entirely. But, as noted at 3-4 n. 5, *supra,* that option is not available to New Jersey automobile insurers. Of course, insurers with a reasonable expectation of making an adequate return would not wish to leave. And New Jersey would not feel the need to erect ever higher barriers to exit unless it thought insurers in general were concerned with rate adequacy. In fact, a number of insurers had left New Jersey prior to the 1990 enactment of FAIRA, and there is now a virtual stampede. *See In the Matter of the "Plan for Orderly Withdrawal from New Jersey" of Twin City Fire Ins. Co.,* 248 N.J. Super. 616, 591 A.2d 1005 (App. Div. 1991). As previously noted, Allstate, having curtailed its writing for many years, now seeks to withdraw entirely from New Jersey.

The Rise and Fall of the JUA

Because the No-Fault Act required all motorists to maintain insurance, *N.J. Stat. Ann.* 39:6A-3, some mechanism was necessary to provide coverage to those unable

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[8] Allstate has pending rate requests filed in August and October, 1990. Hearings on the latter filing are complete, and a decision by the Administrative Law Judge is required by early 1992, with a decision by the Commissioner due a few months later. The earlier filing is mired in discovery, and no hearing has yet been scheduled.

to obtain it in the voluntary market.[9] The Act called for an "assigned risk" plan through which high-risk motorists could be assigned to insurers at rates established by the plan. *N.J. Stat. Ann.* 17:29D-1. The assigned-risk rates were based largely on state-regulated voluntary-market rates for standard risks. Beginning in the 1970's, the Commissioner provided some subsidy to the assigned risk rates by including certain "flat charges" or "policy constants" in premium rates for all policies (including those in the voluntary market). *See State Farm Mutual Auto. Ins. Co. v. State,* 124 N.J. 32, 41-42, 590 A.2d 191, 196 (1991).

The New Jersey Automobile Full Insurance Availability Act of 1983 ("the JUA Act"), *N.J. Stat. Ann.* 17:30E-1 *et seq.,* abolished the assigned risk plan and created the JUA to insure those unable to procure coverage in the voluntary market. The JUA was to function as an entirely independent insurance company; private insurers were to have no liability for JUA policies. *N.J. Stat. Ann.* 17:30E-7(b), -8(a). *State Farm Mutual Auto. Ins. Co. v. State,* 124 N.J. 32, 41, 590 A.2d 191, 196 (1991). The JUA had no capital, so it was crucial that JUA revenues be adequate and proper reserves be maintained (notably for losses which had already occurred but had not yet been adjusted and paid). The Commissioner had "plenary powers" to set policy for the JUA and control its operations. *Id.*

The Legislature contemplated that JUA rates would be similar to those for standard risks in the voluntary market, and, so, would not suffice for higher-risk JUA policies. *State Farm Mut. Auto. Ins. Co. v. State,* 124 N.J. 32, 41-42, 590 A.2d 191, 196 (1991). Accordingly, it provided

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[9] Ordinarily, even relatively high risks are voluntarily insurable if insurers are able to charge a premium adequate to reflect the risk. However, if they are prevented from charging an adequate rate, as has often been the case in New Jersey, or the insured is unwilling or unable to pay it, even a low-risk insured may be frozen out of the voluntary market.

the JUA with additional sources of revenue: policy constants collected on voluntary-market policies and certain Department of Motor Vehicles surcharges collected from those with bad driving records. *N.J. Stat. Ann.* 17:30E-8(a); 17:29A-35. The Commissioner was also empowered to impose a residual market equalization charge ("RMEC") to be collected by insurers on every insured vehicle and remitted to the JUA. The RMEC was to be set to allow the JUA to operate on a no-profit, no-loss basis. *N.J. Stat. Ann.* 17:30E-3(o), 8(b).

The JUA Plan of Operation was to provide, *inter alia,* "methods and standards for the establishment of adequate and actuarially sound reserves for unpaid losses, including provisions for incurred but not reported losses." *N.J. Stat. Ann.* 17:30E-6, -7(r). Regulatory insurance accounting requires that amounts reserved or added to reserves be treated as expenses in calculating profit or loss. Thus, to operate on a no-profit, no-loss basis, the JUA required a RMEC on voluntary-market policies sufficient (with other JUA revenues) to fund the necessary reserves. The JUA Plan, as approved by the Commissioner, initially required the JUA Board to recommend a RMEC computed on this basis. (Aa 231A-235A)

In 1984, the JUA Board recognized that the JUA was operating at a loss and recommended a RMEC for 1985 to meet the aforementioned statutory mandate to balance its books. However, rather than approve a RMEC for 1985 – a gubernatorial election year – the Commissioner mandated that the JUA adopt a cash-flow method of accounting, paying claims arising out of old policies with premiums received under new policies *without* setting aside the reserves necessary to meet the obligations arising under the policies whose premiums were thus diverted. (Aa 237A-243A)

Adoption of cash-flow funding for the JUA made an eventual financial disaster virtually inevitable. Without reserves for losses already incurred, the JUA could not pay claims on policies already written unless it wrote more policies and then diverted the premiums received

on those new policies to satisfy the claims under prior policies. In other words, cash-flow underwriting made the JUA nothing more than a State-run Ponzi scheme.

The deterioration of the JUA's financial situation, caused by a prolonged freeze of its already inadequate rates, the refusal to implement RMEC's and the absence of reserves, ultimately put in jeopardy its ability to meet even its cash flow needs. In 1988, the Commissioner was finally forced to implement a RMEC. *State Farm Mut. Auto. Ins. Co. v. State,* 124 N.J. 32, 42, 590 A.2d 191, 196 (1991).

In 1988, the New Jersey Legislature sought to begin depopulating the JUA, then insuring roughly half of New Jersey's motorists (*id.*), by requiring the voluntary market to absorb those JUA insureds with better driving records. FAIRA § 20. Insurers were not to be allowed to charge rates which would make such drivers attractive customers, but compelled to take assigned quotas of JUA insureds, whether or not they were attractive. FAIRA § 20. FAIRA accelerated JUA depopulation and prohibited the JUA from issuing or renewing any policy after September 30, 1990. FAIRA §§ 16, 88(c)(5).

FAIRA created the MTF to arrange for the issuance and renewal of policies from October 1, 1990 through September 30, 1992.[10] FAIRA § 88(a)-(c). The MTF was initially to charge the JUA rates in effect on September 30, 1990. FAIRA § 88(c)(2). *However, the MTF was to receive neither policy constants nor RMEC's, which had amounted to roughly a third of the JUA's revenues.* (App. 13 at 294) Loss of these subsidies alone required a 50% increase in JUA rates just to restore the revenue level which produced the

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[10] By September 30, 1992, the MTF is to be populated by no more than 10% of New Jersey drivers, with driving records so poor they will not be "eligible" for voluntary-market insurance. FAIRA § 88(c)(5). They are to be insured by a new assigned risk plan. FAIRA § 34. Effective April 1, 1992, all drivers legally "eligible" for insurance in the private market will be entitled to buy it from any insurer they choose. FAIRA § 24.

JUA deficit; more than 50% would be required to fund reserves for payment of current claims and thus attain a break-even level, even with no new or increased costs. The losses suffered by the MTF (or, hypothetically, its profits) were to be shared among the insurers doing business in the voluntary market. FAIRA § 88(a).

By the time it ceased writing policies, on October 1, 1990, *the JUA had run up an admitted deficit of $3.3 billion in seven years. State Farm Mut. Auto. Ins. Co. v. State,* 124 N.J. 32, 43, 590 A.2d 191, 196 (1991).

Funding the JUA Deficit

Under FAIRA, funding to pay the $3.3 billion in claims for which the JUA had accumulated no reserves is to come largely from a 5% tax on insurers' premium receipts for three years and assessments on insurers of $160 million per year (2.7% of premiums in 1990) for eight years. *State Farm Mut. Auto. Ins. Co. v. State,* 124 N.J. 32, 43-45, 590 A.2d 191, 197 (1991). On the face of the statute, insurers are forbidden to recover those taxes and assessments from their policyholders. *Id.* The Commissioner, in defending attacks on this scheme, took the position that, as a matter of statutory construction, FAIRA taxes and assessments can be considered expenses for ratemaking purposes if that proves necessary to avoid an unconstitutional confiscation of insurers' property. The New Jersey Supreme Court accepted this construction to avoid facial invalidation of the statute and directed that the resulting rate filings be handled expeditiously. *Id.* at 58-63, 590 A.2d at 204-07. In practice, however, the Commissioner has – as usual – delayed dealing with these filings.

Based on the Commissioner's position, and even prior to the New Jersey Supreme Court's decision, in August 1990 Allstate made a rate filing seeking recovery of FAIRA taxes and assessments. In November, 1990, the Commissioner rejected that filing on the ground that it failed to comply with new procedures which he was

planning, but had not yet published or promulgated. *Allstate Ins. Co. v. Fortunato,* 248 N.J. Super. 153, 157-58, 590 A.2d 690, 692 (App. Div. 1991). Not surprisingly, the Appellate Division held that the filing must be accepted. *Id.*

The Appellate Division found the Commissioner's excuse for his dilatory conduct "lame indeed," and declared that "there must be an end to the delays in the Department's preparations to deal with its [statutory] responsibilities." *Id.* at 165, 590 A.2d at 696. It pointed out the severe

> impact of delay on the insurers. Their surtax and assessment liabilities commenced with the enactment of the FAIR Act, and represented millions of dollars of new costs. If the insurers were entitled to pass those costs along, . . . they can do nothing without action by the Commissioner. Approval of a rate filing is prospective only. . . . Thus, the longer it takes the Commissioner to consider a filing, the greater are the permanently lost revenues, no matter how clearly entitled to them the insurers may ultimately be proven to be.

Id. at 160-61, 590 A.2d at 694 (citation and footnote omitted).

Neither the Commissioner nor the New Jersey Supreme Court has indicated any way by which, in light of the purely prospective nature of ratemaking, insurers can recover taxes and assessments paid prior to approval of the newly required filings. Thus, to avoid further potentially irrecoverable losses, Allstate sought permission to put its proposed increase into effect on an interim basis during the rate proceeding, subject to later refund if found unjustified. The Commissioner denied this request,[11] and Allstate is currently

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[11] The Commissioner concluded that he lacked power to grant such interim relief, and that, even if he had the power, interim relief would be improper unless it were absolutely certain that Allstate would otherwise suffer confiscation – a standard which cannot possibly be met where the rate proceeding is incomplete and Allstate's contentions disputed. (App. 16) However, New Jersey clearly recognizes the general need for such relief, and the Commissioner has been permitted to

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seeking judicial review of that denial. *In Re Allstate Ins. Co.*, No. A-6219-90T5 (N.J. Super. App. Div.). The rate proceeding itself is currently mired in discovery, by the Commissioner and the Public Advocate, and no hearing date has yet been set.

The MTF Rate Filing

By statute, the JUA's rates (but with no RMEC's and policy constants) became those of the MTF on October 1, 1990. FAIRA § 17. In November, 1990, the MTF obtained two independent actuarial studies indicating that its rates must increase an average of roughly 60% to cover the costs of insuring its current population. (Aa 187A-227A) In January, 1991, the Commissioner's deputy (to whom the Commissioner had delegated his sole authority to operate the MTF; *see* FAIRA § 88; App. 13 at 307) filed for an increase averaging only 28%. (Aa 140A-144A)

Filing for a rate increase substantially less than that necessary to cover the costs of insuring the MTF population seemingly meant that the remainder of the MTF's costs (amounting to hundreds of millions of dollars) would be imposed on Allstate and other private insurers, which are statutorily obligated to absorb the MTF's losses. FAIRA § 88; *but see* App. 13 at 304 (where the Commissioner deliberately incurs losses, he may not be able to require insurers to pay them).

The Proceedings Below

On January 24, 1991, while the MTF rate filing was pending, the Commissioner issued the Depopulation Order to Allstate (and similar orders to 44 other insurers).

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grant interim relief in circumstances where he found it desirable to do so. *See In Re Industrial Sand Rates*, 66 N.J. 12, 25-26, 327 A.2d 427, 434-35 (1974); *New Jersey State AFL-CIO v. Bryant*, 55 N.J. 171, 176-77, 260 A.2d 225, 227-28 (1969).

(App. 1) Allstate was ordered to issue policies at either its own voluntary-market rates or the almost-always higher MTF rates. Allstate promptly presented the Commissioner documentary evidence and declarations showing that compliance with the Order would have a confiscatory effect, and requested that the assignments be deferred until the Commissioner either provided rate relief or made judicially reviewable findings that no relief was necessary. (Asa *passim*; App. 8) The Commissioner did not respond, and the Appellate Division stayed the Order pending its decision.

With an exception not material here, the Appellate Division rejected statutory challenges to the Depopulation Order.[12] 248 N.J. Super. at 376-87, 591 A.2d at 636-41, App. 2 at 47-60; App. 9, 10, 11. It then reached Allstate's state and federal constitutional claim, beginning with the recognition that:

> The insurers are entitled to earn a reasonable rate of return on their New Jersey auto insurance business. . . . There is . . . a right to have the regulatory agency which exercises the rate-making function do its job reasonably promptly, and

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[12] The Appellate Division held that a statute forbade the Commissioner to require insurers to utilize or compensate JUA producers. 248 N.J. Super. at 380-83, 591 A.2d at 638-39; App. 2 at 55-56. This will allow insurers to use less expensive methods of providing policy service to assigned customers, but the savings would only minimally reduce the confiscatory effect previously projected.

To date, the Commissioner has not revised the order to delete the unlawful portion or to specify how policies will now be selected for assignment. Yet, the Commissioner's criteria indicating what types of policies are to be assigned were affirmed. 248 N.J. Super. at 378-80, 591 A.2d at 637-38; App. 2 at 49-51. So long as the Commissioner adheres to these provisions, alteration of the method of selecting individual policies of those types should not alter the economic impact of the order on Allstate. But until the Commissioner corrects the state law defect, Allstate has a temporary reprieve from the Order.

> with no more delay than is necessarily involved in the review process itself. The prime reason for expecting prompt consideration of rate increases is that they are prospective only. Thus, rates that were inadequate during a prolonged review process can not be retroactively increased or otherwise made up.

Id. at 387, 591 A.2d at 642; App. 2 at 61 (footnote and citations omitted).

However, in light of the Commissioner's contention that his Order would not have a confiscatory impact, the Appellate Division found itself unable, on the current record, to determine which party was correct. The Appellate Division also noted that, just before its decision, the Commissioner had announced the grant of some rate relief to the MTF (without yet issuing a written order or opinion). Yet, despite the undisputed actuarial studies before it, the court felt unable to determine the impact of that increase. The court concluded that it was "in no position . . . to predict whether that untested new business taken on by the insurers from MTF at untested new MTF premium rates will result in future losses so clear and significant that the insurers are entitled to protection in advance." *Id.* at 390, 591 A.2d at 643; App. 2 at 64. It therefore granted no relief on Allstate's constitutional claims.[13]

The MTF Rate Increase

After the Commissioner's deputy filed for only a 28% MTF rate increase, Allstate sought leave to participate in the proceeding to urge the necessity of the 60% increase indicated by the two actuarial studies. The Commissioner denied that motion. (App. 12 at 291, 298)

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[13] Allstate then took an appeal to the New Jersey Supreme Court as a matter of right on the state and federal constitutional issues and sought discretionary review on one state statutory issue. As required, N.J.R. 2:12-9, all issues were presented in a single petition. (App. 4) The denial of certification had the effect of summarily dismissing the appeal. *Id.*

Ten days before the Appellate Division decided this case, the Commissioner announced an MTF rate increase of only 18.6%. (App. 12 at 284) He did not purport to find that an 18.6% increase would suffice to cover the costs of MTF insurance, and the record before him would not support such a finding.[14]

Six months later, on November 19, 1991, the Appellate Division (after expedited briefing) reversed the order denying Allstate an opportunity to participate in the rate proceeding, and remanded for expedited proceedings to set proper rates. It noted that the MTF had initially used JUA rates without the substantial subsidies provided to the JUA. (App. 13 at 294) Accordingly, the court found (App. 13 at 296-97) that

> [i]t must have been apparent to the Commissioner, as the operator of MTF, that the JUA rates were too low. They were so low in the late 1980s that even cash-flow accounting, RMECs, bad-driver increases and other revenue enhancers did not prevent dramatic yearly deficits. The anticipated greater accountability and efficiency of MTF, limitation of generous policy benefits, and other cost containment measures could be expected to accomplish just so much. The loss of RMECs would be a tremendous loss of revenue, and there were no means provided in the FAIR Act to subsidize residual market premium rates.
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> Although the actuarial consultants both reported in the first half of November 1990 that MTF rates were grossly inadequate, the Special

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[14] Without the benefit of any contrary study, the Commissioner began by making various "adjustments" to the actuarial studies, which purportedly reduced the break-even rate from 60% to 47.4%. (App. 12 at 276-78, 284) He then identified factors which he claimed created some uncertainty as to the MTF's actual rate need, and simply declared that he would allow only an increase of 18.6%. (App. 12 at 284-89)

> Deputy Commissioner of Insurance in charge of MTF did not ask the Commissioner for higher rates until January 17, 1991, when he formally submitted his "Filing for Rate Revision." The Commissioner studied the matter for another four months, and made his decision on May 10. MTF had by then been operating for more than 7 months with rates that were plainly and obviously too low.

The court then criticized the dubious basis for seeking only a 28% increase and the Commissioner's rationale (or lack thereof) for allowing only an 18.6% increase. (App. 13 at 297-301) Because the Commissioner had failed to provide adequate opportunities for Allstate and other interested parties to participate in the rate-setting process, the court remanded for further proceedings. It closed with this admonition (App. 13 at 309-10):

> Rate hikes are prospective only. There is no way for MTF or voluntary market insurers to charge retroactively higher premiums for earlier policy periods. Thus, the continued inadequacy of MTF rates, if indeed they are inadequate, would constitute a continually increasing loss that could never be made up. In these circumstances, all practical speed is the only acceptable pace for appropriate proceedings for review and evaluation of MTF rates. It may not be possible to make definitive judgments about MTF's predicted losses, but there are enough problem indications to require the Commissioner's immediate attention.

In response to this order, the Commissioner's deputy filed, on December 4, 1991, a request for a 15% interim MTF increase, to take effect January 15, 1992.[15]

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[15] This filing, made by the Commissioner's deputy before the Commissioner, is a public record whose contents are judicially noticeable under New Jersey law. N.J.R. Evid. 9; *West Milford Twp. v. VanDecker*, 235 N.J. Super. 1, 11, 561 A.2d 607,

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(App. 14) That request was based upon a new actuarial study.[16]

To cover the future costs of MTF risks, the study finds an increase with a probable range of 24% to 42% is needed, with a most probable need of 32.7%. It is possible that the needed increase might fall outside the probable range and be as low as 15% or as high as 50%. (App. 14 at 323) However, the study cautioned that these extreme figures have *"essentially zero credibility. . . .* [and] *[i]mplementation of a rate change less than the probable range would be . . . actuarially unsound and likely result in an MTF deficit."* (App. 14 at 323 (emphasis in original)) Of course, the requested 15% increase is at the extreme low end of the possible range, a point of "essentially zero credibility."

Even a grant of the proposed 15% increase would not moot this case. Combined with the prior increase it would still not bring the MTF up to a break-even level according to *any* of the available evidence. As long as MTF business is apparently loss-producing, and there is no finding that Allstate has excess profits sufficient to absorb such losses, there is still a prima facie case that the Depopulation Order will have a confiscatory effect on Allstate.[17]

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612 (App. Div. 1989), *aff'd,* 120 N.J. 354, 576 A.2d 881 (1990). Factual statements therein are adoptive admissions by the Commissioner through his deputy. N.J.R. Evid. 63(8). Its contents are relevant to show that neither the 18.6% increase already granted nor the additional 15% increase now proposed moots this case.

[16] The new study obtained by the Commissioner's deputy concluded that the MTF has already accumulated a deficit of roughly $300 million, of which between $50 million and $147 million would have fallen on private insurers had they depopulated the MTF at the statutorily-required speed and charged MTF rates to the depopulated risks. (App. 14 at 314)

[17] Adequate MTF rates would only prevent confiscation if depopulation assignments were an average or better sample of

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REASONS FOR GRANTING THE WRIT

WHERE A STATE COMPELS A COMPANY TO EMPLOY ITS PROPERTY FOR THE PUBLIC SERVICE AT STATE-MANDATED PRICES, IT MUST PROVIDE PROCEDURES ADEQUATE TO PROTECT AGAINST ANY UNNECESSARY RISK OF CONFISCATION DURING THE PENDENCY OF PROTRACTED PROCEEDINGS TO ADJUST THOSE PRICES.

There is no question as to the substantive constitutional standards which govern rate regulation. Businesses required to provide public service – including insurers – must be allowed the opportunity to earn a just rate of return on their activities in the State. *Duquesne Light Co. v. Barasch,* 488 U.S. 299, 310 (1989); *Helmsley v. Borough of Fort Lee,* 78 N.J. 200, 223, 394 A.2d 65, 70 (1978), *app. dism'd,* 440 U.S. 978 (1979).

Regulated rates must be sufficient not only to cover costs and expenses, but also to yield a profit "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." *Federal Power Comm'n v. Hope Natural Gas Co.,* 320 U.S. 591, 603 (1944) (citations omitted). "[T]he return to the equity

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MTF risks. Unfortunately, under the Order this is not so. A statute prevents rates in any territory from exceeding statewide average rates by more than fixed percentages. *N.J. Stat. Ann.* 17:29A-36(c). Accident frequencies and other loss-producing factors in some territories exceed statewide averages by more than the statutory percentages. (Aa 73A) Thus, were MTF rates adequate, rates in lower-risk territories would have to be inflated to subsidize those in high-risk territories, producing a mix of overpriced and underpriced territories. With inadequate rates, all territories may be underpriced, but some are more so than others. Depopulation assignments are to be made disproportionately from those territories with the lowest percentages of drivers insured in the voluntary market. (App. 1 at 5-6) These are the most underpriced territories, which are least attractive to private insurers. As a result, depopulation risks are systematically underpriced relative to an average collection of MTF risks.

owner should be one which is commensurate with returns on investments in other enterprises having corresponding risks." *Id.; Hutton Park Gardens v. West Orange Town Council,* 68 N.J. 543, 570, 350 A.2d 1, 14-15 (1975). To force Allstate to suffer massive and unrecoverable overall losses resulting from involuntarily insuring depopulation risks would unconstitutionally confiscate its property.

This case does *not* present the question whether the rates which Allstate would be permitted to charge on the involuntary business are in fact adequate. As Allstate has always recognized, that depends on disputed facts and cannot be resolved on this record.

Contrary to the Appellate Division's ruling, however, this point does not end the inquiry. It only raises the question actually presented by Allstate: What procedures must New Jersey provide to protect against confiscation which may occur during the protracted rate proceedings? *Cf. First English Evang. Lutheran Church v. County of Los Angeles,* 482 U.S. 304 (1987) (right to just compensation for even temporary denial of use of property).

Questions of this sort recur regularly. They arise (1) in facial challenges to the validity of regulatory schemes;[18] (2) in the form of requests to recoup rate deficits already incurred during the rate proceeding;[19]

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[18] *See, e.g., Guaranty Nat. Ins. Co. v. Gates,* 916 F.2d 508, 512-16 (9th Cir. 1990) (insurance statute facially invalid because it precluded timely rate adjustments); *Birkenfeld v. City of Berkeley,* 17 Cal. 3d 129, 165-74, 130 Cal. Rptr. 465, 491-97, 550 P.2d 1001, 1027-33 (1976) (same as to rent control ordinance); *Medical Malpractice Joint Underwriting Ass'n v. Paradis,* 756 F. Supp. 669, 675-77 (D.R.I. 1991) (specific provision of insurance statute precluding necessary adjustments invalid); *Calfarm v. Deukmejian,* 48 Cal. 3d 805, 258 Cal. Rptr. 161, 771 P.2d 1247 (1989) (same); *Helmsley v. Borough of Fort Lee,* 78 N.J. 200, 394 A.2d 65 (1978), *app. dism'd,* 440 U.S. 978 (1979) (same as to rent control ordinance).

[19] *See, e.g., Hope Natural Gas v. FPC,* 196 F.2d 803, 808-09 (4th Cir. 1952) (retroactive application of rate increase to period

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and (3) in the context of prospective requests to implement a provisional increase, subject to later refund if excessive, during the pendency of a rate proceeding. Some courts are receptive to interim rate requests[20] and others are not.[21]

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of rate proceedings impermissible); *Potomac Electric Power Co. v. Public Serv. Comm'n,* 380 A.2d 126 (D.C. 1977) (recoupment through future rate increase permissible for period between erroneous denial of rate increase and correction of that error); *New Rochelle Water Co. v. Pub. Serv. Comm'n,* 31 N.Y.2d 397, 340 N.Y.S.2d 617, 292 N.E.2d 767 (1972) (statute permitted recoupment through future rates of deficiencies during rate proceedings, but recoupment need not be provided where company had been assured at least some return, though less than a just return, during reasonably brief hearing); *Narragansett Elec. Co. v. Burke,* 119 R.I. 559, 381 A.2d 1358, 1364 (1977), *cert. denied,* 435 U.S. 972 (1978) (even though commission acted improperly in suspending rate increase for nine months, utility not entitled to recoup lost revenues).

[20] *See, e.g., Alaska Pub. Utilities Comm'n v. Greater Anchorage Area Borough,* 534 P.2d 549 (Alaska 1975) (interim rate increase required where disposition of rate proceeding not imminent, there was adequate showing of rate inadequacy, and ratepayers would be fully protected by refund mechanism); *Southern Bell Tel. & Tel. Co. v. Bevis,* 279 So. 2d 285 (Fla. 1973); *South Cent. Bell Tel. Co. v. Public Serv. Comm'n,* 555 So. 2d 1370 (La. App. 1990) (agency ordered decrease in rates); *Consumers Power Co. v. Michigan Public Service Comm'n,* 415 Mich. 134, 327 N.W.2d 875 (1982); *City of Tyler v. Television Cable Service, Inc.,* 481 S.W.2d 166 (Tex. Civ. App. Tyler 1972).

[21] *See, e.g., Allstate Ins. Co. v. Gillespie,* 275 Cal. Rptr. 525 (Cal. App. 2d Dist. 1990), *depublished,* No. 5014332 (Cal. Feb. 21, 1991) (so long as rate proceeding conducted as expeditiously as possible, regulated company had no right to compel regulator to exercise power to grant interim rates because there is no right to be protected against interim losses during properly conducted proceeding); *Public Util. Comm'n v. Pedernales Elec. Co-op,* 678 S.W.2d 214 (Tex. App. Austin 1984), *writ ref'd n.r.e.* (no right to rate relief

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This Court had addressed such issues, most notably in *Prendergast v. New York Telephone Co.*, 262 U.S. 43 (1923), but has not done so for many years. Its guidance is required to resolve the confusion now afflicting other courts and to assure that adequate protection is provided to Allstate and other businesses threatened with interim confiscation. Review is also justified to address the implications of a regulatory system which allows New Jersey to draw on insurer income and assets generated in other states to subsidize New Jersey motorists.

A. New Jersey's Compulsion Of Allstate To Employ Its Property To Insure Depopulation Risks Requires That The State Provide A Mechanism Through Which Allstate Can Receive Just Compensation For The Insurance Provided.

This case involves an unusually aggravated form of the common problem just discussed. Allstate has not voluntarily undertaken to perform public service in return for a monopoly. To the contrary, scores of insurers provide automobile insurance in New Jersey. Nor has New Jersey simply prescribed the terms on which business may be done and left insurers the choice to proceed on those terms or not at all. Rather, New Jersey has compelled Allstate to do business on New Jersey's terms. Finally, Allstate has not *voluntarily* entered into commercial relationships which New Jersey requires it to *continue* (on altered terms) pursuant to newly enacted regulations. Instead, New Jersey demands that Allstate enter into

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during reasonable period of regulatory delay in processing rate application; also relying on statutory right to institute interim rate after application had been on file 90 days). The depublication of *Gillespie* means it is not precedential, even in California. But that case expressed candidly an approach which seems to underlie many less articulate (and often unreported) decisions by other tribunals.

new involuntary relationships, on terms set entirely by the State.[22]

Allstate is a conscript, pure and simple. A State may conscript property, but the Constitution requires that it pay for the privilege.

New Jersey's conscription of Allstate to provide insurance to depopulation risks has far-reaching impacts on Allstate's nationwide business. The underwriting of insurance involves acceptance of premiums today in return for promises to pay losses in the future. Those promises must be backed with large financial assets if they are to be fulfilled. Since insurance claims require some time to be adjusted and paid, reserves must be maintained to cover losses which have already arisen but have not yet been paid.

If (1) losses were perfectly predictable, (2) rates were adequate, (3) reserves were properly determined, and (4) the insurer's assets were correctly valued and not subject to fluctuation, an insurer could theoretically operate with no assets other than its reserves and the facilities and equipment necessary for its operations. However, that would place the security of insureds at risk if any of those assumptions proved untrue. To minimize the likelihood that such contingencies might render the insurer unable to discharge its obligations to its insureds, the insurer must have substantial equity capital to serve as a "cushion" against such risks.[23]

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[22] *Compare Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (state authorization for utility to physically occupy portion of landlord's property to provide services to tenants constituted *per se* taking where landlord never agreed to such occupancy), *with FCC v. Florida Power Corp.*, 480 U.S. 245 (1987) (regulation altering contractually agreed price for use by tenant voluntarily accepted by owner did not constitute a taking in light of the fact that regulated price covered all owner's costs, including fully allocated cost of capital).

[23] *See* Kimball, *All Lines Authority: Implications for Solidity*, 11 Forum [now Tort & Insurance L.J.] 433, 437-38 (1976); H.

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To maintain assurance of solvency, insurance regulators and financial rating services prefer that insurers not write annual premium volumes exceeding roughly two to three times their equity capital. National Ass'n of Insurance Comm'rs, *Using the NAIC Insurance Regulatory Information System* 7 (1990). Thus, regulatory constraints and customer concerns about an insurer's reliability limit, to a small multiple of its available capital, the total volume of insurance which it can write. In other words, forcing an insurer to write certain risks effectively forces it to allocate a portion of its capital to support those policies and makes that capital unavailable to support other policies.

How much capital must be allocated to a given group of policies while maintaining a given level of policyholder security depends on the level of risk of those policies, and the adequacy of the rates charged. If the risk is very unpredictable, more random fluctuations must be expected and more capital must be allocated. More importantly here, if the rates are inadequate (or their adequacy is doubtful), the capital required to back those policies must suffice both to absorb likely rate deficits and provide for normal fluctuations.

Thus, by forcing Allstate to write large numbers of risks at rates which are prima facie confiscatory, New Jersey has severely constrained Allstate's ability to use its capital to write insurance in other, more profitable markets, and has subjected Allstate's capital to the risks of the assigned policies. In effect, New Jersey has appropriated a portion of Allstate's capital to its own use. Moreover, the effect of New Jersey's actions is to allow it to apply income and assets generated by Allstate in other States to subsidize the cost of insurance for New Jersey motorists.

Where a State thus appropriates the use of private property, it must provide a mechanism to compensate the

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Denenberg & S. Kimball, eds., *Insurance Government and Social Policy: Studies in Insurance Regulation*, ch. 6 ("Capital and Surplus Requirements") (1969).

owner for the use of that property. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). Here, the only mechanism New Jersey has provided is the (prospectively set) rates which it permits for the mandated insurance. Hence, an insurer must be protected against rate inadequacy or it will have no assurance of just compensation.

B. Where A State Provides Compensation Exclusively Through Prospective Setting Of Rates For The Regulated Service, Protection Must Be Provided Against Confiscation During The Process Of Adjusting Those Rates.

Providing compensation through purely prospective rates is inherently risky to the regulated business. If the rate set is initially inadequate or becomes inadequate, and the rate adjustment process is lengthy, then the regulated business will suffer irrecoverable losses during that process. This risk is especially pronounced if the regulator may be motivated to manipulate the process so that rate proceedings take even more time, with no increase permitted until they are completed.[24]

Unless losses suffered on account of currently inadequate rates will be compensated in the future, current confiscation cannot be permitted pending determination of a final rate. *Prendergast v. New York Telephone Co.*, 262 U.S. 43 (1923). In *Prendergast*, a telephone company was ordered to reduce its rates pending completion of hearings to set rates. The order was said to be "temporary," but (as is true in New Jersey) no procedure was

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[24] In New Jersey's last gubernatorial election, automobile insurance rates were a major issue. One of Governor Florio's main campaign promises was to reduce those rates. Anthony DePalma, *Car Insurance: The Issue That Won't Go Away in New Jersey*, N.Y. Times, Nov. 4, 1989, sec. 1, p. 28, col. 1. Thus, it is in his political interest, and that of his appointee, the Commissioner, to suppress those rates in every way possible, regardless of the cost to insurance companies, which do not vote.

available to recoup any deficits which might be incurred while the "temporary" order was in effect. This Court sustained a preliminary injunction staying the rate reduction, but requiring the company to refund any charges above the level originally ordered which were later found excessive.

The Court held that the ostensibly temporary character of the order did not

> deprive the Company of its right to relief at the hands of the court. The orders required the new reduced rates to be put into effect on a given date. They were final legislative acts as to the period during which they should remain in effect pending the final determination; and if the rates prescribed were confiscatory the Company would be deprived of a reasonable return upon its property during such period, without remedy, unless their enforcement should be enjoined. Upon a showing that such reduced rates were confiscatory the Company was entitled to have their enforcement enjoined pending the continuance and completion of the rate-making process.

Id. at 49. *Accord Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 591-92 (1926); *Banton v. Belt Line Ry. Corp.*, 268 U.S. 413 (1925); *Oklahoma Nat. Gas Co. v. Russell*, 261 U.S. 290 (1923). *See also West Ohio Gas Co. v. PUC*, 294 U.S. 79, 83 (1935) ("Present confiscation is not atoned for by merely holding out the hope of a better life to come").

C. The Procedures Utilized By A State To Protect Against Confiscation Must Include Independent Judicial Review Of The Need For Current Relief.

New Jersey has taken the view that the propriety of rates whose regulation is entrusted to an administrative agency may not be considered by a court in the first instance. *In Re Industrial Sand Rates*, 66 N.J. 12, 19, 327 A.2d 427, 431 (1974). The agency must, as a precondition to judicial review, first marshall and sift the relevant facts, providing the benefit of its expert analysis. *Id.* The Constitution permits such a

limitation. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 52-53 (1936). The reviewing court may give considerable weight to the administrative findings. *Id.*

But the supremacy of the Constitution over state law does not permit a state legislature to remit the question of confiscation solely to the unbridled discretion of an administrative officer. This Court so held in *St. Joseph Stock Yards*, first noting that (*id.* at 51-52):

> the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the Legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The Legislature cannot preclude that scrutiny or determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained.

This principle applies equally where a legislature has entrusted the ratemaking power to an administrative agency:

> Nor can the Legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously

> to impair the security inherent in our judicial safeguards.

Id. at 52.

Judicial review is particularly necessary where, as here, the administrative agency is institutionally biased, since it must impose costs either on the party claiming confiscation or on the mass of ratepayers to which the agency is politically responsible. Moreover, the Supremacy Clause itself relies on state courts as a primary means of assuring that state government is kept within constitutional limits. U.S. Const., art. VI, cl. 2 ("The Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby. . . . "). To allow a state legislature to preclude judicial review of questions of confiscation would allow it to evade constitutional commands.

Thus, if a State chooses, as New Jersey has, to limit initial determination of questions of rate adequacy to administrative officers, then it must protect private parties asserting substantial claims of confiscation during the pendency of protracted administrative proceedings. When such an officer is faced with a prima facie showing that his contemplated action will have a confiscatory effect, the officer must either protect the party claiming confiscation (by such devices as deferral of the challenged action or interim rate relief) or determine, on a record susceptible to judicial review, that no protection is necessary.[25] *Cf. Jersey Central Power & Light Co. v. Federal Energy Regulatory Comm'n*, 810 F.2d 1168, 1177-79 (D.C. Cir. 1987) (en banc) (Bork, J.) (where agency applies policy which is ordinarily valid but which regulated party claims will have a confiscatory impact in the particular situation, agency must conduct evidentiary proceedings to evaluate the claim of confiscation). New Jersey has denied Allstate the requisite level of procedural protection.

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[25] It is unnecessary in this case to determine what standard should be applied by the administrative officer and the reviewing court. One possibility would be the familiar standard applied to preliminary injunction motions, as interim rates are essentially a form of administrative preliminary relief

D. Allstate Has Made A Sufficient Showing To Require Further Proceedings Before It May Be Subjected To The Risk Of Confiscation.

The declarations filed by Allstate's actuaries (Aa 43A-44A) make out a prima facie case of confiscation. They are strongly supported by the independent actuarial reports (Aa 187A-227A; Aa 140A-144A; App. 13), *most of which were prepared by the Commissioner's own consultants*. But the most compelling prima facie support for finding confiscation here flows from the operation of New Jersey's regulatory system itself.

Once rates have been fixed which are just and reasonable, they are presumed to remain just and reasonable until the contrary is shown. *See, e.g., Swift & Co. v. United States*, 343 U.S. 373, 382-83 (1952). Where, as with the JUA/MTF, rates were deliberately set at a level which was not just and reasonable, even with the subsidies formerly provided by RMEC's and policy constants, then it should likewise be presumed that they have not spontaneously become just and reasonable.

Nor can this presumed inadequacy on the assigned business be made up by any excess profit on Allstate's other New Jersey business. Allstate's present automobile insurance rates were approved by the Commissioner long before FAIRA.[26] Even if, despite FAIRA's imposition of

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[26] Allstate's last general rate increase took effect in March, 1989. Since that time, Allstate has taken three flex-rate increases, which are designed solely to protect Allstate against inflationary cost increases. *N.J. Stat. Ann.* 17:29A-44a. Such increases are based on the percentage increase of specified components of the Consumer Price Index, relating to medical services and automobile repairs. The losses incurred by insureds (which Allstate promises to pay) reflect those cost increases, so that flex-rate increases simply maintain the pre-existing level of rate adequacy or inadequacy unchanged by

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new taxes and assessments, Allstate's voluntary-market rates could be presumed to remain adequate for voluntary business, they surely must also be presumed not to be excessive for that business. Accordingly, the voluntary business can provide no excess profits to subsidize losses from the depopulation assignments.

In short, the New Jersey system of rate regulation itself supports a presumption that the Depopulation Order *will* have a confiscatory effect on Allstate.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the decision of the Appellate Division.

Respectfully submitted,

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the effects of those cost factors. Such increases cannot themselves correct for pre-existing rate inadequacy or render adequate rates excessive. Nor can they correct for any rate inadequacy or excessiveness created by circumstances, other than price increases, such as changes in the law.

Allstate has also been permitted to implement a non-standard risk rating plan (effective January 1, 1992), which will slightly increase (by about 3%) its voluntary-market revenue levels. (Aa 289A, ¶ 11) Such an increase cannot possibly overcome the overwhelmingly larger effects of such costs imposed by FAIRA as the new taxes and assessments (totalling 7.7% of premium). Thus, the non-standard risk rating plan could not produce any excess profits in the voluntary market to subsidize depopulation losses.